

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARVIN W. AND)
IVA C. SIMMONS)

For Appellants: Marvin W. Simmons, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

David M. Hinman
Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Marvin W. and Iva G. Simmons against

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proposed assessments of additional personal income tax against Marvin W. Simmons, individually, in the amount of \$39.20 for the year 1971, and against Iva G. Simmons, individually, in the amount of \$40.72 for the year 1971.

The question presented is whether respondent properly denied one-half of the capital loss carryover deductions which appellants claimed for the year 1971..

Appellants, husband and wife, filed separate returns for the year 1971. in which they each claimed a \$1,000 capital loss carryover deduction from the previous taxable year. Respondent determined that in their 1971 returns appellants were each entitled to report a maximum capital loss carryover of \$500 (in excess of capital gains for that year). Appellants protested the resulting deficiency assessments, and respondent's denial of their protest gave rise to this appeal.

The provisions of the California Revenue and Taxation Code imposing limitations on capital losses and capital loss carryovers are found in section 18152. Respondent's denial of one-half of appellants' claimed capital loss carryover deductions for 1971 was based upon an amendment to section 18152 which was effective December 8, 1971. (Stats. 1971, 1st Ex. Sess. , ch. 1, p. 4987.) Prior to 1971, any qualifying taxpayer could deduct up to \$1,000 of capital losses incurred in the taxable year or carried over from the preceding taxable year. The 1971 change in the law limited such a capital loss deduction of a married taxpayer filing a separate return to \$500. (Rev. & Tax. Code, § 18152, subd. (b).) Respondent applied the law as amended in 1971 to deny appellants one-half of their claimed capital loss carryover deductions.

Appellants make several arguments in support of their contention that they are entitled to the full amount of the capital loss deductions claimed. First, they argue that the above mentioned 1971 amendment to section 18152 of the Revenue and Taxation Code is not applicable to a capital loss carryover from a previous taxable year. Secondly, they urge that since respondent's instructions for preparation of 1971 personal income tax returns indicated they were each entitled

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to claim a \$1,000 capital loss carryover deduction in that year, respondent should not now be allowed to deny them any part of the deductions which they claimed pursuant to those instructions.

These identical arguments were made unsuccessfully by the appellants in Appeal of Lester A. and Catherine B. Ludlow, decided by this board on March 18, 1975. We there concluded that subdivision (b) of section 18152 of the Revenue and Taxation Code, as it read after the 1973. amendments to that section, did apply to limit to \$500 the carryover loss deductions allowable to spouses filing separate returns for 1971, as the so-called "transitional rule" contained in former subdivision (f) of section 18152 was not applicable to subdivision (b) of that section. In Ludlow we also determined that although respondent's instructions for preparation of 1971 personal income tax returns concededly were erroneous on this point, no estoppel would lie against respondent. We must similarly reject appellants' arguments in the instant case.

Appellants also argue that, in claiming \$1,000 capital loss carryover deductions for 1971, they relied on information contained in a California tax service publication. Although it was not mentioned in the Ludlow opinion, the appellants therein also contended that they had relied on one of the tax services in claiming the larger capital loss carryover deduction. We agree with respondent that the State of California is not bound in any way by erroneous information contained in publications of the various tax services.

Finally, appellants argue that even if the proposed assessments against them were proper, they are unable to pay them because "paper money, checks or drafts, are not legal tender,..." In support of this argument appellants rely primarily on article I, section 10 of the United States Constitution, which provides in part that no state shall make anything but gold and silver coin a tender in payment of debts.

This board has a well established policy of abstaining from deciding constitutional questions in appeals involving proposed assessments of additional tax. (Appeal of Iris E. Clark, Cal. St. Bd. of Equal. , March 8, 1976; Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal. , Feb. 18, 1970.) That abstention policy properly

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applies in this case. We do note, however, that in recent years several federal courts have determined that constitutional challenges similar to the ones propounded by appellants herein are frivolous or spurious in nature. (See United States v. Daly, 481 F. 2d 28, 30, cert. denied, 414 U. S. 1064 [38 L. Ed. 2d 469]; United, States v. Porth, 426 F. 2d 519, 523, cert. denied, 400 U. S. 824 [27 L. Ed. 2d 53]; Koll v. Wayzata State Bank, 397 F. 2d 124; Horne v. Federal Reserve Bank of Minneapolis, 344 F. 2d 725, 729; Hartman v. Switzer, 376 F. Supp. 486, 489; Edward A. Cupp, 65 T. C. 68, aff'd, 493 F. 2d 1400.)

Based on the above analysis, we conclude that respondent properly denied \$500 of the \$1,000 capital loss carryover deduction which each of the appellants claimed for the taxable year 1971.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Marvin W. and Iva G. Simmons against proposed assessments of additional personal income tax against Marvin W. Simmons, individually, in the amount of \$39.20 for the year 1971, and against Iva G. Simmons, individually, in the amount of \$40.72 for the year 1971, be and the same is hereby sustained,

Done at Sacramento, California, this 26th day of July 1976, by the State Board of Equalization.

Vallianta Berni, Chairman

George R. Reese, Member

Frank C. Dean, Member

_____, Member

_____, M e m b e r

ATTEST: A. W. Donlop, Executive Secretary